

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN AND
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF RESPONDENT
NATIONAL STEEL CORPORATION
IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission exceeded its jurisdiction under Section 1(b) of the Natural Gas Act regarding transportation of natural gas in interstate commerce and companies which perform such transportation by granting a certificate of public convenience and necessity that authorizes an interstate pipeline to transport user-owned natural gas from Oklahoma to the user's plant in Michigan and to construct limited pipeline facilities to perform the interstate transportation service.

IDENTITY OF AFFILIATES

National Steel Corporation is a Delaware Corporation. It is jointly owned by two parent entities, NII Capital Corporation and NKK U.S.A. Corporation. These corporations are not publicly traded but are subsidiaries of the publicly traded corporations, National Intergroup, Inc. and NKK Corporation. National Steel Corporation has the following subsidiaries owned jointly with others, none of which is publicly traded:

- Buffalo River Improvement Corporation
- Concast Holding A.G.
- Iron Ore Company of Canada
- Iron Ore Land Company
- Mathies Coal Company
- The Messaba-Cliffs Mining Company
- Pilot Knob Pellet Company
- Presque Isle Corporation
- ProCoil Corporation
- Taylor Devices, Inc.

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OCTOBER TERM, 1989

No. 89-1161

STATE OF MICHIGAN AND
MICHIGAN PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
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BRIEF OF RESPONDENT
NATIONAL STEEL CORPORATION
IN OPPOSITION

STATEMENT OF THE CASE

This case involves the authority of the Federal Energy Regulatory Commission ("FERC" or "Commission") over interstate transportation of natural gas. Specifically, Petitioners challenge the Commission's jurisdiction to issue, pursuant to Sections 1(b) and 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717(b) and 717f(c) (1988), a certificate of public convenience and neces-

sity authorizing Panhandle Eastern Pipe Line Company ("Panhandle") (1) to transport natural gas owned by National Steel Corporation ("National") from Oklahoma to National's steel plant in Michigan, and (2) to construct and operate pipeline facilities needed to accomplish the transportation service. The two pipeline taps and meters authorized to be constructed are located on Panhandle's main transmission line at a point that is on National's plant property. The deliveries are made directly to National at high pressure from Panhandle's transmission line, which runs from Oklahoma to Canada across National's steel mill property.

The Commission granted Panhandle's requested certificate of public convenience and necessity based upon a full record consisting of extensive public hearings and briefing in which interested parties were able to present evidence and arguments concerning all factors affecting the public interest. Petitioners, Michigan and the Michigan Public Service Commission ("Michigan"), participated in those proceedings as did Panhandle, National, Michigan Consolidated Gas Company ("MichCon"), other local distribution companies served by Panhandle, and the FERC staff.

As recognized by the Commission, Panhandle's service to National is pure interstate transportation for hire; Panhandle makes no sales whatsoever to National. (*Panhandle Eastern Pipe Line Co.*, 38 FERC (CCH) ¶ 63,009 at 65,041 (1987), Appendix at 124a-125a.)¹ Rather, National owns the gas to be transported (a) prior to delivery to Panhandle, (b) at all times it is in the possession of Panhandle, and (c) at the time of redelivery to National's plant where it is used by National. As found by the Commission:

¹ References to the "Appendix" or "App." are to the Appendix to Michigan's Petition for Writ of Certiorari.

[This case] involves natural gas that is purchased by National Steel in Oklahoma and transported by Panhandle to Michigan. The gas, therefore, will be moving in interstate commerce as defined by the NGA. Because our jurisdiction extends over the transportation of gas to be delivered to end-users, Panhandle's transportation service is subject to our jurisdiction. Furthermore, once we find the proposed transportation to be in interstate commerce, section 7(c) of the NGA requires the pipeline to obtain from us a certificate of public convenience and necessity authorizing such transportation.

(*Panhandle Eastern Pipe Line Co.*, 42 FERC (CCH) ¶ 61,076 at 61,347 (1988), App. at 49a (footnotes omitted).)

The Commission rejected Michigan's contention that Panhandle's interstate transportation of user-owned gas directly to National is "local distribution" beyond FERC's authority. (42 FERC at 61,347-349, App. at 50a-55a.)² Furthermore, the Commission rejected Michigan's contention that the "local distribution" exemption empowers states to veto the Commission's interstate transportation orders. (42 FERC at 61,349, App. at 54a-55a.) It wrote:

State commissions remain free to regulate the rates and review the purchasing practices of distributors under their jurisdiction. If State commissions had authority to frustrate individual pipeline transac-

² Contrary to the implications in the Petition for Certiorari (at 3), the Administrative Law Judge merely held that, since the issue was not before him, he did not need to decide "whether there might be some concurrent jurisdiction . . ." (38 FERC at 65,042, App. at 126a.) The Commission went further and rejected Michigan's claimed right to veto FERC's grant to Panhandle of the certificate of public convenience and necessity. (42 FERC at 61,347-349, App. at 50-55a.) And, the one Commissioner's dissent did not dispute the Commission's exclusive jurisdiction but only whether a condition affecting wholesale services to MichCon should have been imposed. (*Panhandle Eastern Pipe Line Co.*, 44 FERC (CCH) ¶ 61,410 at 62,321 (1988), App. at 90a-92a.)

tions like this one, however, they could seriously affect our ability to foster the development of an economically efficient system of interstate transportation.

(42 FERC at 61,349, App. at 55a.)

On the merits, the Commission amply supported its conclusion that the overall public convenience and necessity are served by Panhandle's interstate transportation and related facilities to serve National. As set forth in detail in the ALJ's Initial Decision, which was adopted in relevant part by the Commission, the \$10 million or more of annual savings to National as a result of this transaction would aid National in its "struggle to survive" in the face of severe financial losses. (38 FERC at 65,042-43, App. at 128a-129a.) As "a significant employer, with 5,500 employees at its Great Lakes Steel plant," the savings to National generated by the project would help it "to avoid further cutbacks in its operations and to avoid further layoffs at its Great Lakes plant where it has already reduced its employment by half" (38 FERC at 65,043, App. at 129a.) This, the Commission found, would "be of benefit to the community where the National Steel plant is located." (*Id.*) Although the Commission considered the possibility of some cost-shifting in MichCon's retail rates, it rejected arguments by MichCon that this warranted disapproving the certificate. (38 FERC at 65,043-44, App. at 129a-132a.) Indeed, the Commission concluded that, irrespective of its approval of Panhandle's certificate, MichCon would lose National's load inasmuch as National was actively pursuing other supply alternatives. (38 FERC at 65,043-44, App. at 131a-132a.) Furthermore, the Commission found that the proposed interconnection and transportation service "would provide Panhandle itself with a substantial incremental load," which was important "particularly in light of Panhandle's load losses." (38 FERC at 65,044, App. at 132a.)³ By

³ The evidence showed that "because of capacity constraints on Panhandle's existing interconnection with MichCon, Panhandle can-

spreading Panhandle's fixed costs over a larger volume of throughput, the transportation to National would eventually lower Panhandle's rates for the benefit of its customers in *all* states. (*Id.*) The certificate authorizing transportation from Oklahoma would also "preserve a large load for the domestic interstate market" since National was otherwise likely to turn to Canadian energy sources. (*Id.*)

The Commission's findings concerning the public convenience and necessity were succinctly summarized (38 FERC at 65,076, App. at 216a-217a) as follows:

[1] Based on an evaluation of the overall benefits to National Steel, to Panhandle and its customers, to the communities near National Steel's plants and to the public interest by fostering competition, versus the potential detriments to MichCon and its other customers from the Panhandle proposal to service National Steel, it must be concluded that the benefits outweigh the potential detriments and that the proposal will serve the public interest. Therefore, granting of the application . . . is required by the public convenience and necessity.

[2] The potential detriments to MichCon and its customers will occur regardless of whether the application . . . is granted because National Steel has a viable other supply option, the underwater pipeline, which it will be able to use in the near future and which is more attractive financially to National Steel than the current gas transportation arrangements with MichCon.

In the decision below, the United States Court of Appeals for the District of Columbia Circuit affirmed both

not serve both MichCon's existing demands for transportation and National Steel's additional load" without constructing the proposed facilities. (38 FERC at 65,034, App. at 108a.) This contradicts Michigan's claim now that Panhandle's proposed construction was not necessary to accomplish the interstate transportation function. Michigan Pet. for Cert. at 11.

the Commission's findings on the merits and the Commission's conclusion concerning its jurisdiction to grant the certificate of public convenience and necessity. Without undertaking an exegesis on "the precise boundaries of FERC and state regulatory jurisdiction," the Court unanimously declared "we have no difficulty in holding that FERC has jurisdiction over the particular arrangement involved in the present controversy." (883 F.2d at 121, App. at 8a-9a.) It wrote:

The arrangement in dispute involves merely interstate transportation of natural gas, a subject matter clearly within the Commission's jurisdiction. . . . The present arrangement is the subject of federal regulation pursuant to the NGA because the arrangement involves the transportation of natural gas in interstate commerce, not a local sale. It is undisputed that title to the gas passes in Oklahoma, not Michigan. Panhandle, the transporter of the gas, is not a party to the sale. Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'

(883 F.2d at 121, App. at 9a.) Inasmuch as the transaction merely involves Panhandle's transportation of third-party gas in interstate commerce, the D.C. Circuit had no doubt the matter is within FERC's jurisdiction: "Transportation in interstate commerce is clearly a subject for federal regulation under 15 U.S.C. § 717(b)." (883 F.2d at 122, App. at 10a.)⁴

⁴ Prior to FERC's issuance, on September 10, 1987, of the certificate authorizing Panhandle to serve National, MichCon filed a complaint with the Michigan Public Service Commission asking that it assert jurisdiction over Panhandle's proposed transportation and facilities. After FERC issued the certificate, declaratory judgment and injunctive actions were initiated in Michigan and were consolidated before the U.S. District Court for the Western District of Michigan. On September 29, 1987, the Michigan PSC issued an

REASONS FOR DENYING THE WRIT

I. SUMMARY

As set forth more fully below, a writ of certiorari is not warranted in this case. The decision of the D.C. Circuit is consistent with decisions of other circuits and long-standing interpretations of the Natural Gas Act by this Court. It involves a clear-cut application of law to the simplest set of jurisdictional facts.

Michigan's arguments to limit FERC's jurisdiction fly in the face of fifty years of history in which FERC (or its predecessor, the Federal Power Commission) has routinely considered and approved certificates of public convenience and necessity under NGA Section 7 for interstate transportation of natural gas directly to gas users and for pipeline facilities to effectuate direct transportation to gas users. Michigan's contention that the Commission's interstate transportation jurisdiction is restricted to deliveries to local distribution companies conflicts with holdings by this Court. The claim that NGA Section 1(b)'s local distribution proviso overrides FERC's jurisdiction over interstate transportation is rebuffed by clear legislative history and holdings of this Court which state that the local distribution proviso is "surplusage" and in no way limits the NGA's affirmative grant of jurisdiction over interstate transportation or sales for resale. Moreover, Michigan's argument, if adopted, would disrupt FERC's ability to regulate interstate pipelines and their transportation

order prohibiting Panhandle from constructing the FERC-approved facilities and serving National. Eventually, the U.S. District Court and the Sixth Circuit held that FERC has exclusive jurisdiction over Panhandle's interstate transportation service and facilities, which preempts Michigan's regulation of Panhandle's service and facilities. *Michigan Consolidated Gas Co. v. Panhandle's Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), *aff'g* *National Steel Corp. v. Long*, 689 F.Supp. 129 (W.D. Mich. 1988), *petition for cert. filed sub nom. State of Michigan v. Panhandle Eastern Pipe Line Co.*, 58 U.S.L.W. 3491 (U.S. Jan. 24, 1990) (No. 89-1160).

services and facilities. It would empower states to veto interstate pipeline facilities and services found by the Commission to be in the public interest, to order changes in pipeline's interstate facilities and services approved by FERC, and to order premature abandonment of facilities and services in violation of Section 7(b) of the NGA.

II. THE CRITERIA FOR A WRIT OF CERTIORARI ARE NOT SATISFIED IN THIS CASE.

There is nothing remarkable about the D.C. Circuit's decision affirming FERC's jurisdiction over interstate transportation of third-party owned gas and over facilities needed to perform that interstate transportation service. The D.C. Circuit's decision involves a clear-cut application of law to the simplest possible set of facts relevant to jurisdiction. As held by that court, "It is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce.'" (883 F.2d at 121, App. at 9a.) Michigan's requests for rehearing and for rehearing *en banc* were rejected without any judge asking for a vote thereon. (App. at 19a.)

Nor is there any conflict among the circuits. In a companion case, the Sixth Circuit reached the same conclusion concerning FERC's jurisdiction to approve Panhandle's interstate transportation and deliveries to National and the facilities associated therewith. *MichCon v. Panhandle*, 887 F.2d at 1300. That case is now pending before this Court on Michigan's separate petition for a writ of certiorari in No. 89-1160. Other courts directly or indirectly addressing this issue have reached a similar conclusion that FERC has jurisdiction over direct transportation to end-users, even if it lacks authority over direct sales. See, e.g., *FPC v. Louisiana Power and Light Co.*, 406 U.S. 621 (1972); *International Paper Co. v. FPC*, 438 F.2d 1349 (2d Cir.), *cert. denied*, 404 U.S. 827 (1971). Cf. *Public Serv. Elec. & Gas Co. v. FPC*, 371 F.2d 1 (3d Cir.), *cert denied*, 389 U.S. 849 (1967).

III. MICHIGAN'S ARGUMENT CONFLICTS WITH THE STATUTE, THE LEGISLATIVE HISTORY, LONG-STANDING PRACTICE, AND DECISIONS OF THIS COURT.

At the heart of its position, Michigan would have this Court fundamentally rewrite the Natural Gas Act. Michigan claims that the Commission exceeded its jurisdiction under the NGA by certificating interstate transportation for hire directly to a consumer and facilities needed to perform that interstate transportation service. In effect, Michigan seeks to break up the FERC's plenary authority over interstate transportation of natural gas by limiting the Commission's interstate transportation authority only to approving physical connections and deliveries to local distribution companies, not to gas users. Such a rewrite of the Act would nullify certificates of public convenience and necessity issued by FERC for the interstate transportation and delivery of gas to end users since the earliest days of the Natural Gas Act.⁵

The Commission's jurisdiction under the NGA reflects the limits of state regulation of interstate commerce in natural gas as they were understood by Congress at the time of enactment. When the NGA was enacted, it was understood that the states could regulate neither interstate transportation of natural gas nor sales for resale in interstate commerce. As explained by the Solicitor of the Federal Power Commission (FERC's predecessor) in hearings preceding enactment, "The States cannot control the wholesale rates extracted for natural gas thus transported, nor may they regulate any other of the phases of the interstate transportation."⁶ As this Court held in

⁵ See, e.g., *Louisiana-Nevada Transit Co.*, 2 FPC 546 (1939), *aff'd sub nom. Arkansas Louisiana Gas Co. v. FPC*, 113 F.2d 281 (5th Cir. 1940).

⁶ *Natural Gas*: Hearings on H.R. 11662 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. 16 (1936) (Brief in Support of Constitutionality).

Pennsylvania v. West Virginia, 262 U.S. 553, 596-97 (1923):

A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission [of natural gas], is a regulation of interstate commerce, a prohibited interference.

Only retail sales of natural gas and low pressure, local delivery systems for making retail sales were understood to be within the jurisdiction of the states. *See FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950). Michigan cites no cases which hold that pure interstate transportation could be regulated by the states.

Congress reflected its understanding of that division of authority in Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), which gives jurisdiction over interstate transportation exclusively to the Commission:

The provisions of this Chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(Emphasis added.) In Section 7(c) of the Act, 15 U.S.C. § 717f(c), Congress required that, before initiating any interstate transportation service or constructing any facilities to render such service, an interstate pipeline ("natural gas company") must first obtain a certificate of public convenience and necessity from the Commission.

In contrast to the Commission's sales jurisdiction, which is limited to interstate "sales for resale" and excludes retail sales, the Commission's jurisdiction over in-

terstate transportation of natural gas is complete and encompasses transportation for hire and transportation to users for consumption. NGA Section 1(b), 15 U.S.C. § 717(b). In *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83, 89 (1966), this Court succinctly summarized the NGA's broad grant to FERC of transportation authority:

The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale. *FPC v. East Ohio Gas Co.*, 338 U.S. 464; *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1; *Panhandle Eastern Pipe Line Co. v. FPC*, 359 F.2d 675.

In *East Ohio*, 338 U.S. at 468, this Court rejected efforts to limit the Commission's transportation jurisdiction to transportation in conjunction with wholesale deliveries.⁷ See *FPC v. Louisiana P&L*, 406 U.S. 621.

Throughout its history, the Commission has exercised transportation jurisdiction over (1) interstate pipelines' construction and operation of facilities to transport and deliver natural gas directly to consumers and (2) the

⁷ Even the dissenting Justice in *East Ohio* conceded that the Commission's jurisdiction over interstate "transportation for hire" was exclusive. Section 1(b) "would quite obviously within the words of the statute give exclusively to the Power Commission jurisdiction over companies which might act in the nature of common carriers transporting in interstate commerce for hire." 338 U.S. at 487 (Jackson, J., dissenting).

Pursuant to NGA Section 1(c), 15 U.S.C. § 717(c), which was enacted in response to the *East Ohio* decision, a state may now regulate natural gas transportation by companies which (a) are located wholly within the boundaries of the state and (b) redeliver entirely within the state gas received from other states. While Section 1(c) resolves possible conflicts over regulation of companies operating entirely within one state, it does not give any support to state regulation of transportation by an interstate pipeline such as Panhandle.

interstate transportation and delivery of gas through those facilities. See *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 24 (1961); *supra* note 5. Historically, the Commission typically exercised its transportation jurisdiction over interstate pipelines' deliveries to users and related delivery facilities in conjunction with retail sales made by interstate pipelines even though the Commission did not exercise authority over those retail sales. See *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507, 523 and n.23 (1947) [hereinafter *Panhandle/Indiana*]; *Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467, 471 (3d Cir.), *cert. denied*, 352 U.S. 891 (1956) ("This control over gas transportation by the Commission is completely independent of the sale of the gas and just as important.").

In *FPC v. Louisiana P&L*, 406 U.S. at 636, this Court squarely upheld the Commission's exclusive power to regulate interstate transportation of natural gas directly to industrial consumers:

Each of [the factors of Section 1(b)] is an independent grant of jurisdiction and, though the Act's application to "sales" is limited to sales of interstate gas for resale, *the Act applies to interstate "transportation" regardless of whether the gas transported is ultimately sold retail or wholesale.*

(Emphasis added.) Further, the Court wrote:

Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate setting*, and in no wise limited the broad base of "transportation" jurisdiction granted the FPC.

(*Id.* at 640). That decision also confirmed the Commission's *certificate* authority over transportation directly to a user: "A 'jurisdictional' pipeline transports natural gas in interstate commerce and for that reason is subject to FPC certification jurisdiction." (*Id.* at 626, n.1.) See *FPC v. Transcontinental*, 365 U.S. at 4 ("[B]ecause

it does not entail a sale for resale in interstate commerce, [this transaction] is not subject to the Commission's jurisdiction *except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.*" (Emphasis added.)).

Michigan rests its argument to limit FERC's jurisdiction over interstate transportation deliveries to users upon the weak reed of Section 1(b)'s "local distribution" exemption. As this Court has recognized, however, that proviso was merely intended to clarify Congress' decision not to include *retail sales* within the scope of the NGA; it does not limit the Commission's jurisdiction over interstate transportation. This is explicitly stated in the House and Senate Committee reports, H.R. Rep. No. 709, 75th Cong., 1st Sess. 3, and S. Rep. No. 1162 (1937), 75th Cong., 1st Sess. 3 (1937):

That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.

On at least two occasions, this Court has recognized the "local distribution" exemption to be surplusage, citing the explicit legislative history. *East Ohio*, 338 U.S. at 470-71; *FPC v. Louisiana P&L*, 406 U.S. at 637 n.14. In *FPC v. Louisiana P&L*, this Court wrote:

It is well established that the proviso [concerning local distribution] was added to the Act merely for clarification *and was not intended to deprive [the] FPC of any jurisdiction otherwise granted by § 1(b).*

(*Id.* (emphasis added).)

The two cases principally relied upon by Michigan do not call for a different result as both cases involved only the ability of states to regulate *retail sales* by interstate

pipelines—not interstate transportation services—in the absence of federal regulation of retail sales under the NGA. See *Panhandle/Indiana*, 332 U.S. at 516-20; *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951) [hereinafter *Panhandle/Michigan*].⁸

In neither of those cases did the Supreme Court doubt that the federal Commission has exclusive authority to regulate the *interstate transportation* of the gas to be sold or the facilities to perform such transportation. Indeed, in *Panhandle/Indiana*, the Court recognized with approval the fact that the Commission had issued a certificate of public convenience and necessity “under § 7(c) of the Natural Gas Act to extend [the pipeline’s] facilities to serve the DuPont plant”—the very action which Michigan now declares is beyond FERC’s legal authority. 332 U.S. at 523 and n.23. Moreover, the Court reiterated that interstate transportation deliveries to a user are within the Commission’s jurisdiction: “the matter of interrupting service is one largely related, as appellees say, to *transportation and thus within the jurisdiction of the Federal Power Commission to control . . .*” (*Id.* at 523 (emphasis added).)

Nor is it possible, as Michigan would have it, to break up Panhandle’s interstate transportation service for National so as to separate Panhandle’s “delivery” and associated facilities from the “interstate transportation” subject to FERC’s jurisdiction. Regulation of interstate transportation for a shipper necessarily involves the pipeline’s receipt, transportation and delivery of the shipper’s natural gas, plus the facilities, rates, and terms for rendering such service. Without control over an interstate pipeline’s delivery of gas, the NGA’s grant of

⁸ *Panhandle/Indiana* approved state regulation of rates charged by a pipeline for retail sales, while *Panhandle/Michigan* held that a state could require an interstate pipeline to obtain a state certificate permitting a retail sale.

jurisdiction over "transportation of natural gas in interstate commerce" would be ineffectual. See *FPC v. Louisiana P&L*, 406 U.S. 621. It would leave FERC powerless to control the size, location, nature and use of interstate transportation facilities, as well as the rates, curtailments and myriad other attributes of the transportation services. Moreover, this Court has held that "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981) (emphasis added). Interstate transportation begins with receipt by the pipeline and ends only after delivery by the pipeline. See *United Gas Pipe Line v. FPC*, 385 U.S. 83; *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 308 (1924). Indeed, just as the principal cases cited by Michigan held that the pipeline's retail sales to users were sales in interstate commerce,⁹ so is it clear that the pipeline's transportation deliveries in this case are transportation in interstate commerce—a matter in FERC's exclusive jurisdiction under NGA Section 1(b).

Unlike the retail sales cases cited by Michigan, no "regulatory gap" is left after the Commission has exercised its jurisdiction over the interstate transportation service to National. All aspects of Panhandle's interstate transportation from receipt through delivery are regulated by FERC. In the proceedings below, the Commission performed a comprehensive review of the term, rates and interruptibility of the service; the nature and identity of the shipper; the source of the gas; the point of receipt and delivery; the existing facilities to be used and

⁹ *Panhandle/Indiana*, 332 U.S. at 513; *Panhandle/Michigan*, 341 U.S. at 333. In *East Ohio*, the Court indicated that interstate transportation ends when the gas is reduced in pressure and enters community systems of local mains for distribution. 338 U.S. at 469-470. That is not at issue here since Panhandle will deliver at high pressure directly off its mainline, and a low pressure community distribution system is not involved in this case.

the new ones to be constructed; and the project's impacts on the pipeline's existing customers, on producers, on the pipeline, on community and national interests, on Mich-Con, and on the shipper, National. (*Panhandle Eastern Pipe Line Co.*, 40 FERC (CCH) ¶ 61,220 at 61,751-754 (1987), App. at 67a-73a; 38 FERC at 65,034-46, App. at 105a-136a; 38 FERC at 65,076, App. at 216a-217a).¹⁰ The Commission concluded that the public convenience and necessity is served by the project as conditioned by its orders, and it granted a certificate for the interstate transportation of gas and the construction of facilities therefor. The D.C. Circuit affirmed the Commission's findings. (883 F.2d at 121-124, App. at 8a-15a.)

At this time, no aspect of Panhandle's service is left to be regulated by the State of Michigan. Indeed, any effort by Michigan to impose state certificate and regulatory requirements on the same interstate transportation and facilities would necessarily lead to direct, irreconcilable conflicts.¹¹ As recognized by the Commission below, state vetoes or overlapping regulation of FERC's certificates would disrupt FERC's "ability to foster the development of an economically efficient system of interstate transportation." (42 FERC at 61,349, App. at 55a.) Such state regulation of interstate transportation would also place Panhandle in the impossible dilemma of being unable "to serve two masters." What could Michigan do at this point? Would it change the point of delivery? the

¹⁰ Although uncontested below and therefore not discussed, FERC's orders, as well as its regulations and Panhandle's tariffs, also govern many other aspects of the service to National, including the quality of gas to be delivered, the pressure at which deliveries are to be made, the priorities for interruption and curtailment, the requirements for maintaining balance between a shipper's injections and withdrawals, procedures for scheduling Panhandle's receipts and deliveries, penalties for noncompliance, warranties of title, and the ability of a customer to change receipt and delivery points.

¹¹ *MichCon v. Panhandle*, *supra* note 4, 887 F.2d at 1300-02.

rate? the nature or location of the facilities to be constructed? the identity of the customer? the priorities for Panhandle curtailments of deliveries? the terms of the service? Would it impose an additional "delivery" charge or alter the pressure or quality specifications? Or would it simply "st[and] at the state line and impose[] its regulation upon the final step in the process at the moment the interstate commodity enter[s] the state"? *Missouri v. Kansas Natural Gas*, 265 U.S. at 308.

Presumably, under Michigan's conception of its powers, it could do all of the above; and, under Michigan's logic, a state could order the modification, reduction or termination of service in violation of NGA Section 7(b), 15 U.S.C. § 717f(b), which obligates Panhandle to continue rendering services until permitted by FERC to terminate them. In fact, after FERC authorized Panhandle's service to National, the Michigan PSC issued an order to Panhandle prohibiting Panhandle's construction and service to National—in effect vetoing FERC's orders—pending the Michigan PSC's separate decision on whether Panhandle's FERC-approved transportation service should be permitted.¹² However, it cannot seriously be believed that Michigan is free under the NGA and the Constitution to countermand FERC's regulation of Panhandle. As this Court held in *United Gas Pipe Line v. FPC*, 385 U.S. at 88, "the responsibility of the Commission could not adequately be met if it were powerless to assure that facilities 'certificated to transport this gas' . . . continued to operate."

There is likewise no merit to Michigan's argument that the Commission's NGA jurisdiction over interstate transportation should be circumscribed because the exercise of that jurisdiction may "affect" state regulation of local distribution companies' rates and rate designs. Unques-

¹² *MichCon v. Panhandle*, 887 F.2d at 1298, 1301.

tionably, the Commission's regulation of interstate pipelines' rates and services and the construction and operation of facilities affects both 'local interests' and state regulation of local distribution companies' costs, rates and services in myriad ways and in every state. See, e.g., *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). That is the inevitable consequence of federal regulation of interstate pipelines' facilities, rates and services under the NGA. That fact does not, however, overturn federal regulation of interstate pipelines. Indeed, given the broad repercussions of FERC's actions, the Commission cannot be faulted for having weighed all factors affecting local and national interests, including possible impacts on MichCon's rates,¹³ in concluding that the project was required by the public convenience and necessity. See *FPC v. Transcontinental*, 365 U.S. 1. While Michigan may not agree with the merits of the orders below, FERC certainly does not lose its subject matter jurisdiction simply because it considered the full range of factors affecting the overall public interest.

Further, contrary to Michigan, the recent increase in stand-alone ("unbundled") interstate transportation services for shipper-owned gas, i.e., interstate transportation for hire, does not justify a novel statutory construction that limits the Commission's long-established jurisdiction over interstate transportation and the facilities used therefor. Changes in the industry are the stuff of which legislation is made; they are not a basis for a judicial rewrite of the fundamental jurisdictional structure of the Act.

¹³ MichCon itself introduced evidence concerning possible impacts on its rates in the hopes of persuading the Commission to disapprove the certificates. (App. at 116a-117a, 129a-130a.)

CONCLUSION

The petition for writ of certiorari should be denied. This case presents a pure case of interstate transportation for hire of natural gas. It is a matter clearly within the jurisdiction of the Federal Energy Regulatory Commission under Section 1(b) of the Natural Gas Act. No conflict exists among the circuits or with any decisions of this Court.

Respectfully submitted,

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